In view of my finding on the main ground of the intervener's appeal, I do not consider it necessary to deal with the other subsidiary grounds that were relied upon by counsel for the intervener. In the result, this appeal is allowed with costs.

*Appeal allowed.*

Solicitors: *Lewis & Co*; *Albar Zulkifly & Yap*; *Wan-Marican & Hamzah.*

Reported by *Wong Kim Fatt*

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## R & I Securities Sdn Bhd v Syarikat Tanaman dan Perusahaan Perak Sdn Bhd

HIGH COURT (JOHORE BAHRU) – CIVIL SUIT NO 277 OF 1979
LC VOHRAH J
5 MAY 1988

*Land Law – Private caveat – Extension by ex parte originating summons – Application to discharge order by summons-in-chambers – Objection – Whether caveat should remain – Limitation – National Land Code 1965, s 323(1)*

This is an application by the defendant by way of summons-in-chambers to discharge an order granted on 16 December 1981 in originating summons no 371 of 1981 extending a private caveat entered on 24 December 1975 in respect of a piece of land lot no 1165 in the state of Perak ('the said land') until the final disposal of the suit or its earlier withdrawal by the plaintiff.

The plaintiff was a stockbroker and it obtained a resolution from the defendant to create a charge over the said land. This charge could not be and was never registered because the consent of the first chargee, United National Finance Bhd, could not be obtained and also because prior approval for the creation of the charge had not been obtained from the Mentri Besar of Perak. The plaintiff arranged to sell certain shares in Mosbert Bhd to Patel Holdings Sdn Bhd which in turn was to sell them to Hong Kong Securities Ltd. As the shares were not taken up by Hong Kong Securities Ltd, Patel Holdings Sdn Bhd sued the plaintiff in Penang, whereupon the plaintiff entered the said caveat to protect itself. The sole question for decision is whether the plaintiff's interest in the said land is of such a nature as to entitle it to caveat it under the provisions of s 323(1) of the National Land Code 1965.

**Held,** allowing the application: (1) The order extending the caveat must be discharged and the caveat should be removed. Limitation has set in to bar the plaintiff from enforcing any rights, legal or equitable, under the agreement to create the charge.

(2) Costs of this application to be paid by the plaintiff in any event.

**Cases referred to**

1 *Eng Mee Yong & Ors* v *Letchumanan* [1979] 2 MLJ 212 (refd)
2 *Inter-Continental Mining Co Sdn Bhd* v *Societe Des Etains De Bayas Tudjuh* [1974] 1 MLJ 145 (refd)
3 *Krishna Kumar* v *United Malayan Banking Corporation Bhd* [1983] 1 MLJ 106 (refd)

**Legislation referred to**

National Land Code 1965 s 323(1)

*Al Raj* for the defendant/applicant.
*Upali Masacorale* for the plaintiff/respondent.

*Cur Adv Vult*

**LC Vohrah J:** This is an application on the part of the defendant by way of a summons-in-chambers to discharge an order granted on 16 December 1981 in originating summons no 371 of 1981 extending a caveat lodged on 24 December 1975 in respect of land held under HS (D) LP 36/73 for lot no 11665 containing an area of 5024.7403 acres in the mukim of Durian Sebatang, district of Hilir Perak, in the state of Perak ('the said land') until the final disposal of this suit or its earlier withdrawal by the plaintiff.

The brief facts forming the background of this application are as follows. The plaintiff carried on business as a stockbroker at no 65, Jalan Tan Hiok Nee, Johor Bahru. The defendant at the relevant time was a company wholly owned by Mosbert Bhd whose directors were also the directors of the defendant and it carried on business next door to the plaintiff's business premises at no 66. An arrangement was entered into whereby the plaintiff was to sell shares in Mosbert Bhd to Patel Holdings Sdn Bhd which in turn was to sell the shares at an enhanced price to a company purportedly registered in Hong Kong known as Hong Kong Securities Ltd. Pursuant to this arrangement, the plaintiff on 27 May 1975 sold 1,100,000 shares in Mosbert Bhd to Patel Holdings Sdn Bhd at a price of $699,188 which sum Patel Holdings Sdn Bhd paid in full. On 28 May 1975, Patel Holdings Sdn Bhd sold to the plaintiff the same shares at the enhanced price of $752,735, delivery to be made on 28 August 1975. This delivery date was subsequently deferred to 28 November 1975. In order to secure the repurchase by Hong Kong Securities Ltd before the deadline, the plaintiff sought and obtained a resolution from the defendant to create a charge (see exhibit 1D1, encl 16) which resolution was conveyed in the defendant's undated letter to United National Finance Bhd, the first chargee, for the purpose of obtaining the release by the first chargee of the issue document of title to the appropriate land registry in contemplation of the registration of the second charge (see exhibit 1D2, encl 16). A charge instrument was apparently drawn up by the defendant in favour of the plaintiff in respect of the said land (see exhibit WCK3, encl 12) but it could not be or was never registered because the consent of the first chargee could not be obtained and also because of the restriction in interest requiring the prior approval of the Mentri Besar of Perak for the creation of a charge which approval had not been obtained. As Hong Kong Securities Ltd did not take up the shares, Patel Holdings Sdn Bhd filed an action against the plaintiff in Penang civil

suit no 606 of 1977 for the failure and/or refusal to take delivery of the shares in consequence of which the plaintiff, to protect itself, lodged the caveat on 24 December 1975, and later on 21 August 1979 filed the present suit to recover the amount for these shares and other amounts in respect of other shares altogether totalling $1,999,570.27.

A preliminary objection was raised by counsel for the plaintiff to the effect that the present application for removal of the caveat was wrongly brought by summons-in-chambers in the present suit because the caveat having been extended in an application by way of an originating process, ie originating summons no 371 of 1981, in respect of a caveat which had been lodged four years before the present suit was filed, any subsequent application to set aside the order that had been granted for the extension should have been made by a summons-in-chambers in that particular originating summons or by way of another originating process. I overruled the objection as the application for the extension of the caveat by the plaintiff in originating summons no 371 of 1981 had in fact been made ex parte so that the defendant would not necessarily in the normal course of events have known of the application by originating summons and as, more importantly, the whole basis for the plaintiff making the ex parte application for the extension of the caveat, as stated in para 6 of the affidavit in support (see encl 2), was the subsistence of the present suit which had specifically been filed for the purpose of providing the necessary security for the recovery of the sum claimed therein. I was more than satisfied that the defendant had shown sufficient nexus between the continuance of the caveat and the existence of the present suit to justify its taking out a summons-in-chambers in the present suit itself in order to discharge the order extending the caveat.

As to the substance of the application, the sole question that has to be determined is whether the plaintiff's interest in the said land is of such a nature as to entitle it to caveat it under the relevant provisions of s 323(1) of the National Land Code. Those provisions read:

> 323(1) The persons and bodies at whose instance a private caveat may be entered are –
>
> (a) any person or body claiming title to, or any interest in, any alienated land or any right to such title or interest;
>
> (b) any person or body claiming to be beneficially entitled under any trust affecting any such land or interest; and
>
> (c) the guardian or next friend of any minor claiming to be entitled as mentioned in paragraph (b).

Counsel for the plaintiff concedes that on the authority of *Eng Mee Yong & Ors* v *Letchumanan*,[1] the onus is upon the plaintiff to show that it has a caveatable interest and contends that although the plaintiff's claim in the present action is purely for a liquidated sum, that sum was secured by the charge instrument WCK3 which, per se and despite its want of registration, conferred upon the plaintiff a right to a registrable interest thus entitling it to caveat the said land. In support of this contention, counsel referred to *Inter-Continental Mining Co Sdn Bhd* v *Societe Des Etains De Bayas Tudjuh*.[2] In that case, according to the headnote, the appellant had obtained a permit to mining land, of which the respondent was the lessee. Owing to heavy losses sustained in the mining operations, it was mutually agreed that the land should be given to a third party to work on a sublease on payment of a premium. The respondent negotiated with a third party and offered it options for a sublease. There were differences of opinion between the appellant and the respondent as to the terms of the offer to the third party and in order to protect its rights under its agreement with the respondent, the appellant lodged a caveat against the land. The respondent applied for an order to remove the caveat against the land and the application was granted by the High Court. The appellant appealed to the Federal Court which held, allowing the appeal, that the agreement was in substance a sublease, though not in the statutory form and equity would treat it as an agreement for a sublease and specifically enforce it and that the appellant therefore had a right in equity to a registrable interest in the land, and thus had a caveatable interest under s 323(1)(a) and (b) of the National Land Code. Counsel contended that because the charge instrument had been executed in the proper form, ie Form 16A as prescribed by the National Land Code pursuant to the resolution ID1 passed by the defendant's directors authorizing the creation of a second charge on the said land and confirmed by the letter ID2 from the defendant to United National Finance Bhd requesting the release of the issue document of title 'in order to facilitate the registration of the second charge', WCK3 constituted a contract which conferred a right to a registrable interest enabling the plaintiff to lodge the caveat. In support of his contention, counsel referred to the case of *Krishna Kumar* v *United Malayan Banking Corporation Bhd*.[3] In that case, Krishna Kumar (KK) gave Malaysian Borneo Finance Corporation Bhd (MBF) a first charge on his land on 27 December 1976. But around June 1976, three companies of which KK was the managing director had obtained loans from the bank and these companies later defaulted in their repayments. KK and the three companies, in consideration of United Malayan Banking Corporation Bhd (UMBC) forbearing to sue them for recovery of the loans, agreed to provide additional security in the nature of a second charge on the land conditional upon and subject to the consent of MBF, the first chargee. MBF granted conditional consent on 31 October 1977 and the relevant second charge documents were signed by KK and sent by UMBC solicitors to MBF for their consent on 25 October 1977. MBF refused to grant consent for the

creation of a second charge in favour of UMBC for the reason, inter alia, that UMBC had delayed in sending the second charge instruments. On 8 May 1979, UMBC proceeded to register a private caveat on the land and on 12 November 1979, it sued the three companies and KK for the outstanding loans in these civil suits. On 12 February 1982, UMBC applied for and obtained an order that the private caveat be extended until the final disposal of the three suits. KK applied to set aside the order and for the removal of the private caveat. On dismissing KK's application, Gunn Chit Tuan had this to say at p 108:

> In this case, the applicant as well as his three companies had already executed the relevant charge as well as a supplementary security agreement and although the bank has not signed the said agreement, it could do so at any time and there was therefore in this case not only an agreement but also in my view an instrument of charge in registrable form. The fact that MBF had not endorsed its consent on an annexure to the said charge which might therefore not be accepted by the relevant administrative authorities, did not in my view detract from the fact that it is an instrument of charge in registrable form and that even if the relevant authorities had refused to accept it for registration, nevertheless the bank had in my judgment a registrable interest in the said lands within the meaning of s 323(1)(a) of the National Land Code 1965.

In view of the undisputed fact that there was a clear intention on the part of the defendant and that of the plaintiff for a second charge to be created for the purpose of securing payment by Hong Kong Securities Ltd to the plaintiff for the sale of the shares in consequence of which WCK3 was duly executed, it would at first sight appear that the plaintiff on the authority of *Krishna Kumar's* case[3] has a right in equity to a registrable interest in the said land within the meaning of s 323(1a) of the National Land Code. It is, however, also not in dispute that the second charge was to be created pursuant to an agreement (appearing as an annexure to the inchoate charge instrument) made more than 12 years ago and that no action has ever been filed to specifically enforce the agreement so that limitation has set in to bar the plaintiff from enforcing any rights, legal or equitable, it might have had under the agreement. In the result, I would make an order in terms of the defendant's application that the order dated 16 December 1981 extending the caveat be discharged and that the caveat presentation no 573/75 vol 74 folio 76 be removed and that the costs of this application be paid by the plaintiff in any event.

*Order accordingly.*

Solicitors: *Raj Selva & Co; Jackson & Masacorale.*

Reported by *Wong Kim Fatt*

# Re TSY (An Infant)

HIGH COURT (PENANG) – PETITION FOR ADOPTION NO 46-4-86
EDGAR JOSEPH JR J
3 MAY 1988

*Family Law – Adoption order – Application for – Child given to applicants shortly after birth – Child living with applicants until aged nearly five years – Opposition of natural parents – Whether parental consent to be dispensed with – Whether parental consent unreasonably withheld – Disruptive effect on child – Principles applicable – Adoption Ordinance 1952, s 5(1)*

In this case the applicants applied for the adoption of a boy, who was nearly five years old. The boy had been living with the applicants, who are husband and wife, since shortly after birth. The respondents who are the natural parents of the boy opposed the application. The issue in this case is whether upon the evidence and having regard to the relevant provisions of the Adoption Ordinance 1952, the court would be justified in holding that the consent of the respondents to the making of an adoption order is being unreasonably withheld.

**Held,** allowing the petition: (1) In deciding whether or not to dispense with parental consent, the court must take into account events and conduct right up to the time when the case comes to be considered, whether on the original application for an order or on review by an appellate court.

(2) The court will apply an objective test when considering whether or not to dispense with parental consent on the ground that it is being unreasonably withheld. In this context, the welfare of the child is not the sole consideration to be taken into account though it is a consideration of great importance and has increased in importance over the years.

(3) The disruptive effect on the boy of transplanting him from his familiar surroundings where he has lived for nearly four and half years to his natural parents would be sufficiently permanent and serious to afford cogent reasons for holding that the consent of the natural parents to his adoption was being unreasonably withheld.

[*Editorial Note:* The Adoption Ordinance has been revised as the Adoption Act 1952 (Act 257).]

**Cases referred to**

1 *Re K (An Infant)* [1963] CLY 1771 (refd)
2 *Re L (An Infant)* (1962) 106 Sol J 611; [1962] 3 All ER 1 (folld)
3 *Re H (Infants)* [1977] 1 WLR 471 (refd)
4 *Re C (L) (An Infant)* [1965] 2 QB 449 (refd)
5 *Re B (S)* (1966) 110 Sol J 671 (refd)
6 *Re PA (An Infant)* (1971) 115 Sol J 586; [1971] 3 All ER 522 (refd)
7 *O'Connor* v *A and B* [1971] 1 WLR 1227 (folld)

**Legislation referred to**

Adoption Ordinance 1952 ss 5(1), 6(b), 8, 9

*Lim Leng Han* for the applicants.
*S Asamaley* for the respondents.

*Cur Adv Vult*

**Edgar Joseph Jr J:** This application for adoption concerns a four-year-old Chinese boy ('the boy') born on 23